KARISMA SYNERGY SDN BHD v. GATES PCM CONSTRUCTION (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NAZLAN GHAZALI J
[COMPANIES (WINDING-UP) NO: WA-28NCC-755-11-2017]
3 APRIL 2018

COMPANY LAW: *Winding-up – Petition – Application to wind-up company for failure to make payment for construction works undertaken by petitioner – Whether there was bona fide dispute over debt – Whether there was delay in completion of project – Whether company could pursue liquidated ascertained damages ('LAD') against petitioner – Failure of company to raise LAD earlier – Whether company ought to be estopped – Whether undisputed portion of debt above statutory threshold – Whether presumption of insolvency unrebutted – Whether winding up order ought to be granted – Companies Act 2016, ss. 465(1)(a),(h), 466(1)(a)*

The petitioner and the respondent were companies involved in the construction industry. The matter in litigation arose from a project for the construction of a warehouse ('the project'). The owner of the project was Pengkalan Bekalan Kemaman Sdn Bhd ('PBK') while the main contractor for the project was Puncak Seputih Sdn Bhd ('Puncak Seputih.'). The respondent was a subcontractor for Puncak Seputih and in turn appointed the petitioner to complete the steel structure and roof work at the project. The petitioner sent to the respondent the statutory winding-up notice under s. 465(1)(a) and (h) of the Companies Act 2016 ('CA 2016') as stated in the payment certificate – final dated 23 August 2017. As the same was not paid by the respondent within the requisite 21 days, the petitioner proceeded to file a winding-up petition against the respondent. The respondent argued that the petition was an abuse of process designed by the petitioner to put pressure on the respondent to create a bargaining factor for the petitioner's own long delay in the completion of the project for 172 days, and with liquidated ascertained damages ('LAD') amounting to RM430,000. Given the claim for LAD and the delay against the petitioner, it was the respondent's submission that the debt claimed by the petitioner was thus *bona fide* disputed, and the petitioner, according to the respondent, could not be construed as a creditor for the purposes of the petition. The respondent also argued that it was not insolvent. The petitioner, on the other hand, maintained that the contention on the claim against the petitioner for the delays and LAD was not genuine and was a mere afterthought. The delays and LAD were never, at the material time, raised by the respondent as a basis for any deductions to be made against the payments due from the respondent to the petitioner concerning the latter's works on the project. The issues that arose were, *inter alia* (i) whether there was *bona fide* dispute over the debt; (ii) whether there was any action on cross-claim; (iii) whether the undisputed portion of

A debt was above statutory threshold; (iv) whether there was evidence of commercial solvency; and (v) whether respondent ought to be estopped from raising LAD.

Held (allowing petition):

B **(1)** The respondent had the right to impose and claim LAD from the petitioner for any delay on the part of the latter. But the fact that the respondent as the subcontractor to the project shall be liable to pay LAD to the main contractor for the delay, even if attributed to the petitioner, was no answer to the petitioner's claim or payment against the C respondent. The claim filed by the petitioner was valid, as supported by the payment certificate – final issued by the respondent itself, which clearly provided the requisite substantiation. Just because the respondent claimed there was a delay of 172 days which entitled the respondent to pursue LAD against the petitioner did not make the debt due from the respondent to the petitioner *bona fide* disputed. (paras 33 D & 35)

(2) The respondent was trying to assert that it had a cross-claim against the petitioner on account of the LAD. However, it had not quite done anything on the LAD. No letters were exhibited to show that the E respondent had made the demand nor any letter stating like the letter from the main contractor to the respondent dated 6 May 2017 on the calculation of the LAD due from the respondent. It was only the payment certificate - final which stated 'Delay: 172 days.' But in the contents of that document which set out the various calculations on the items of works, including variation, and deductions for retention, F previous payments made, and even GST, no reference at all was made to any LAD deductions. There was not even a standard payment to say the amount was subject to LAD. It therefore followed that the argument that the petitioner was not a creditor since the debt was disputed could not be sustained. The argument that the petitioner had delayed for 172 G days, without more did not remotely come close to being an argument on the existence of a cross-claim on substantial grounds. The debt could not thus be said to be *bona fide* disputed. (paras 36, 38 & 52)

(3) The purported amount of the LAD as made clear by the respondent itself was only RM430,000, an amount which was less than the debt claimed H by the petitioner of RM519,677.01. The difference in sum, being the undisputed portion of the debt was almost RM90,000. And this was far exceeding the minimum statutory winding-up threshold of RM10,000. Thus, taking into account the disputed portion, the remainder sum making up the debt in the statutory demand issued by the petitioner was I still comfortably above the minimum threshold under the law, beyond which a winding-up may be pursued. (paras 53 & 56)

(4) Once the debt is shown not to be *bona fide* disputed on substantial grounds, and the presumption of insolvency unrebutted even if the respondent could show that it was actually solvent, its refusal to pay would still entitle the petitioner to pursue the winding-up of the respondent. The issue on the inability to pay debt is to be considered in commercial context, which is the neglect to pay current demands regardless of whether the debtor is in possession of assets which, if realised would permit it to discharge its liabilities. The test of commercial insolvency simply means that the respondent company is not able to meet current debts when they fall due. In the instant case, the respondent had not satisfactorily shown that it was not insolvent based on its cash flow position. It had also not furnished any evidence of its more recent financial position, not even any unaudited management accounts. This did little to assist the case of the respondent. A neglect to payment triggers the statutory presumption under s. 466(1)(a) of the CA 2016. Even if the presumption is rebutted, a continued refusal cannot deny the right of a creditor to file a winding-up petition against a debtor. Thus, if a company is solvent and indebted to a creditor, a simple refusal to pay ordinarily cannot legitimately restrain in the granting of a winding-up order. (paras 57, 58, 61, 64 & 65)

(5) The respondent had produced documents which showed that Puncak Seputih had imposed LAD on the respondent. But equally unchallenged was the fact that Puncak Seputih as the main contractor had no contractual relationship with the petitioner. The fact that the respondent at the time of the presentation of the winding-up petition had not received payment from the main contractor who was said to be withholding payment in order to deduct the LAD upon settling with the project owners was a consideration irrelevant to the petitioner whose contractual relationship was with the respondent. There was much validity in the assertion that the respondent should be estopped from raising the LAD issue or any suggestion of cross-claim because in its letter to the petitioner, it was plainly stated that the outstanding payment from the respondent to the petitioner as at 9 February 2017 was RM519,677.01. There was no mention of any payment due from the petitioner to account for any delay, other than the general reference to the respondent reserving its rights in the event of a delay in the completion of the project. In addition, the petitioner claimed that at a meeting involving both the respondent and the petitioner on the more pertinent and later date of 23 August 2017 (also the date of the payment certificate – final), the respondent confirmed that it would make payment of RM570,991.59 to the petitioner within two weeks to one month from the date of that meeting. The facts and conclusions of this meeting were recorded in a letter of the same date issued by the petitioner to the respondent. This letter never got any response from the

respondent which later resulted in the service of the statutory demand for the said debt being claimed. The respondent should therefore be estopped from taking a contrary position now. (paras 68 & 73-75)

(6) The averments of the petitioner on the admission of debt by the respondent were not adequately or credibly disputed by the respondent. There was plainly no *bona fide* dispute on the debt as demanded by the petitioner in its winding-up petition, and that the respondent had also manifestly failed to rebut the presumption of insolvency. Thus, this court granted a winding-up order against the respondent. (paras 79 & 80)

Case(s) referred to:

Bakti Dinamik Sdn Bhd v. Bauer (Malaysia) Sdn Bhd [2016] 10 CLJ 247 HC ***(refd)***
Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***
Dataran Rentas Sdn Bhd v. BMC Construction Sdn Bhd [2007] 6 CLJ 613 CA ***(refd)***
Hasjuara (M) Sdn Bhd v. Bio Science Capital Sdn Bhd [2009] 1 LNS 1430 HC ***(refd)***
Hijau Bumi Petroleum Sdn Bhd v. Platinum Green Chemicals Sdn Bhd & Ors [2017] 1 LNS 1253 HC ***(refd)***
Johor Coastal Development Sdn Bhd v. Constrajaya Sdn Bhd [2009] 4 CLJ 569 FC ***(refd)***
Kejuruteraan Bintai Kindenko Sdn Bhd v. Serdang Baru Properties Sdn Bhd & Another Case (No. 2) [2018] 1 CLJ 369 HC ***(refd)***
Lian Keow Sdn Bhd (in Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 1 LNS 44 SC ***(refd)***
Malayan Plant (Pte) Ltd v. Moscow Narodny Bank Ltd [1980] 1 LNS 44 PC ***(refd)***
Malaysia Air Charter Company Sdn Bhd v. Petronas Dagangan Sdn Bhd [2000] 4 CLJ 437 FC ***(refd)***
Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd [2002] 3 CLJ 380 CA ***(refd)***
Pembinaan Purcon Sdn Bhd v. Entertainment Village (M) Sdn Bhd [2004] 1 LNS 682 HC ***(refd)***
Re Tweeds Garages Ltd [1962] 1 All ER 121 ***(refd)***
Selva Kumar Murugiah v. Thiagarajah Retnasamy [1995] 2 CLJ 374 FC ***(refd)***
Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303 SC ***(refd)***
System Communication Engineering Sdn Bhd v. Zabidin Sdn Bhd [1999] 1 LNS 79 HC ***(refd)***
WWTAI Finance Ltd v. IES Energy Holdings Sdn Bhd [2016] 1 LNS 1801 HC ***(refd)***
Zalam Corporation Sdn Bhd lwn. Dolomite Readymixed Concrete Sdn Bhd [2011] 9 CLJ 705 CA ***(refd)***

Legislation referred to:

Companies Act 1965 (since repealed), s. 218(2)(a)
Companies Act 2016, ss. 465(1)(e), (h), 466(1)(a), (b), (c)
Contracts Act 1950, s. 75

For the plaintiff - WY Chin; M/s Emilia Chin & Co
For the defendant - Mohan Ramasamy & Vijay Sundra; M/s Ram Mo Assocs

Reported by Suhainah Wahiduddin

JUDGMENT

Mohd Nazlan Ghazali J:

Introduction

[1] This concerns a petition for the winding up of the respondent (documented in encl. 1) on the primary basis of the failure to make payment for construction works undertaken by the petitioner.

[2] At the conclusion of the hearing, I granted a winding-up order against the respondent, and highlighted the principal grounds for the decision. This judgment contains the full reasons for my decision.

Key Background Facts

[3] The petitioner and the respondent are companies involved in the construction industry. The matter in litigation arises from a project for the construction of a warehouse in Kemaman, Terengganu ("the project").

[4] The owner of the project is Pengkalan Bekalan Kemaman Sdn Bhd ("PBK"). The main contractor for the project is Puncak Seputih Sdn Bhd ("Puncak Seputih").

[5] The respondent is a sub-contractor for Puncak Seputih. The respondent in turn appointed the petitioner pursuant to a letter of award dated 23 March 2016 to complete the "Steel Structure and Roof Work" at the project.

[6] The petitioner through their solicitors sent to the respondent the statutory winding-up notice under s. 465(1)(e) and (h) of the Companies Act 2016, dated 16 October 2017 demanding payment of RM570,991.59 as stated in the Payment Certificate - Final dated 23 August 2017. As the same was not paid by the respondent within the requisite 21 days, on 9 November 2017, the petitioner proceeded to file a winding-up petition against the respondent.

[7] Hence, the instant petition before me.

Essence Of Contentions Of The Parties

[8] The arguments raised by the respondent in its opposition to the petition are twofold. First, the petition is an abuse of process designed by the petitioner to put pressure on the respondent to create a bargaining factor for the petitioner's own long delay in the completion of the project for 172 days, and with liquidated ascertained damages (LAD) amounting to RM430,000.

[9] Given the claim for LAD and the delay against the petitioner, the debt claimed by the petitioner is thus *bona fide* disputed, and the petitioner, according to the respondent, cannot be construed as a creditor for the purposes of the petition.

[10] Secondly, the respondent argued that it is not insolvent.

[11] The petitioner, on the other hand maintains that the contention on the claim against the petitioner for the delays and LAD is not genuine and is a mere afterthought. The delays and LAD were never at the material time raised by the respondent as a basis for any deductions to be made against the payments due from the respondent to the petitioner concerning the latter's works on the project.

[12] I will now examine the issues raised by the respondent in its resistance to the petition and where relevant for present purposes, discuss the responses made thereto by the petitioner. But first, the statutory requirements of s. 465(1)(e) of the Companies Act 2016.

The Law - The Debt Must Not Be Bona Fide Disputed on Substantial Ground

[13] Although the petitioner grounded this petition on s. 465(1)(e) and (h) of the Companies Act 2016 ("the CA"), it is plain that the focus of its submissions in this instant petition is s. 465(1)(e) of the CA which refers to the winding up ground of "the company is unable to pay its debts."

[14] Section 466(1) contains the statutory presumption of inability to pay debts and further elaborates on situations where a company is deemed to be unable to pay its debts; first, where the company neglects to pay within 21 days after service of a demand under s. 466(1)(a); secondly, where the execution process post-judgment is returned unsatisfied under s. 466(1)(b); and thirdly, where the court determines the company to be unable to pay its debts taking into account the contingent and prospective liabilities of the company under s. 466(1)(c).

[15] For completeness, s. 466(1)(a) provides as follows:

> Definition of inability to pay debts.
>
> (1) A company shall be deemed to be unable to pay its debts if:
>
> (a) the company is indebted in a sum exceeding the amount as may be prescribed by the Minister and a creditor by assignment or otherwise has served a notice of demand, by himself or his agent, requiring the company to pay the sum due by leaving the notice at the registered office of the company, and the company has for twenty-one days after the service of the demand neglected to pay the sum or to secure or compound for it to the satisfaction of the creditor; ...

[16] In the instant case, the petitioner, based on the notice, is also pursuing the winding up of the respondent on the basis of s. 465(1)(e), and as such, relying on aid of the aforesaid statutory presumption under s. 466(1)(a). A failure to pay within the stipulated period of 21 days will give rise to the statutory presumption that the company is unable to pay its debts to all its creditors.

[17] The presumption arising from the neglect to meet the demand confers on the court the jurisdiction to grant a winding-up order on the basis of s. 465(1)(e) of the CA. But the presumption, as most presumptions go, is rebuttable. And it is then for the respondent as the debtor company to demonstrate that it is able to pay all its debts at the material time.

[18] However, a neglect to pay the debt as demanded in the valid winding-up notice could be justified if the refusal is due to the debt being *bona fide* disputed. This is a well-established basis to deny a petition because it represents a direct challenge on the existence of the debt itself. In other words, the key requirement in s. 466(1)(a) concerning the debt is being attacked. If the challenge is successful, the presumption does not arise, since it cannot be said that the respondent has neglected to pay.

[19] After all, the demand must relate to a specified debt. As such, a company has not neglected or refused to pay the debt if the debt is disputed on substantial grounds (see *Securicor (M) Sdn Bhd v. Universal Cars Sdn Bhd* [1984] 1 LNS 124; [1985] 1 MLJ 84).

Whether There Is Bona Fide Dispute Over The Debt - Background

[20] The respondent argued that there was a delay of 172 days on the part of the plaintiff in completing the work. The duration of the completion of the contract stated in the letter of award is from 23 March 2016 to 21 July 2016. But the petitioner was unable to complete the said project on or before 21 July 2016.

[21] As a result, the respondent had to request from the main contractor for an extension of time, which was duly granted to the respondent until 2 October 2016, even though the project owner gave the main contractor more time, until 2 November 2016.

[22] Further however, at a site meeting held on 13 December 2016 at the project owner, PBK informed that the main contractor was unable to complete the work schedule by the extended time on 2 November 2016. In the minutes of the meeting, PBK had indicated that it would invoke its rights under para. 2.1 of the work program to impose liquidated and ascertained damages of RM2,500 for every calendar day commencing from 2 November 2016 against the main contractor until the project completed.

[23] Thereafter, the petitioner has requested the respondent to arrange for a direct payment to be made from the main contractor to the petitioner in order to finance and continue work on the project. Indeed, on 22 November 2016, the main contractor, Puncak Seputih made payment of RM400,000 directly to the petitioner.

[24] It is a key contention of the respondent however that despite the petitioner having received on 22 November 2016 the direct payment of RM400,000, the petitioner did not commence its works on the project until

A 10 February 2017. Given this alleged delay, the respondent on 10 February 2017 sent an email with a letter to the petitioner stating that the petitioner was notified that the project was delayed due to the petitioner, and that any further request for payment would delay the project.

B **[25]** The petitioner, according to the respondent, only finally completed the project on 23 April 2017, as against the deadline of 2 November 2016, representing a delay of 172 days. This exposed all the parties to LAD.

[26] Puncak Seputih, as the main contractor made the final inspection of the project on 25 April 2017, whilst the project owner did the inspection on
C 23 April 2017. The latter also on 5 May 2017 issued the "certificate of practical completion" certifying that works had been satisfactorily completed on 23 April 2017.

[27] On 23 August 2017, the respondent submitted a Payment Certificate - Final to the petitioner. This important document, signed, prepared and
D approved by the respondent, and acknowledged received by the petitioner stated the final contract sum for the works related to the sub-contract with the petitioner for the supply and construction of steel framing, roofing and wall cladding was RM2,434,026.84. The total amount of the claim outstanding from the respondent to the petitioner was specified to be
E RM570,991.59.

[28] The crux of the respondent's submission opposing this petition is that in that same document, it is also clearly stated that actual completion was, as stated earlier, 23 April 2017. More crucially, it also specifies that delay was for 172 days.

F **[29]** The respondent therefore argues that the substantial delay/LAD, amounting to 172 days on account of the petitioner, caused the main contractor and the respondent to be liable to the project owners. The matter ought to be tried in the civil court instead.

G **[30]** There is also, according to the respondent, a *bona fide* dispute on the sum demanded by the petitioner for the balance payment of RM570,0091.59 because the respondent had the right to impose LAD against the petitioner's delay of 172 days.

[31] The letter of award to the petitioner dated 23 March 2016 clearly
H provided for this, as follows:

> Clause 6.1 - Liquidated and Ascertained Damages (LAD)
>
> The subcontractor is hereby informed that the liability for Liquidated and Ascertained Damages amounting RM2,500.00 (Ringgit Malaysia Two Thousand Five Hundred Only) for each calendar day of delay of the
I works up to a maximum of the Contract Sum issued for the works.

Clause 12.1 - Direct Loss and Expenses

Without prejudice to any other right or remedies which GPCM may possess, the Sub-Contractor shall be responsible for any direct loss and expense, including cost of delays suffered by GPMC in the event where the Sub Contractor fails to provide the works as schedule by GPCM. These costs shall be back charges from any payment due to the Sub-Contractor or recorded as debt to GPCM.

[32] Further, the petitioner had also been informed a number of times about the delay on its part was causing delay to the completion of the project, as mentioned earlier.

[33] In my evaluation, it is not doubted that the respondent had the right to impose and claim LAD from the petitioner for any delay on the part of the latter. But the fact that the respondent as the sub-contractor for the project shall be liable to pay LAD to the main contractor for the delay, even if attributed to the petitioner is, in my view no answer to the petitioner's claim for payment against the respondent.

[34] The respondent asserted that the LAD payable to the main contractor due to the petitioner's delay in completing the work within time was 202 days. This is clearly stated in a letter dated 6 May 2017 from Puncak Seputih to the respondent where there had been a delay of 202 days, from 3 October 2016 to 23 April 2017. A total LAD sum of RM505,000 was stated in that letter to be imposed by the main contractor on the respondent. The respondent, on the other hand, only charged the petitioner for a delay of 172 days, from 3 November 2016 to 23 April 2017, which amounted to RM430,000.

[35] On that basis the respondent claimed that the petition for the debt is *bona fide* disputed. I reiterate that the claim filed by the petitioner is valid, as supported by the Payment Certificate - Final issued by the respondent itself clearly provides the requisite substantiation. Just because the respondent claimed there was a delay of 172 days which entitles the respondent to pursue LAD against the petitioner does not make the debt due from the respondent to the petitioner *bona fide* disputed.

No Action On Cross Claim, If Any

[36] What the respondent is in my view really asserting, without actually stating it, is that it has a cross claim against the petitioner on account of the LAD. It has not quite done anything on the LAD. No letters were exhibited to show that the respondent had made the demand nor any letter stating like the letter from the main contractor to the respondent dated 6 May 2017 on the calculation of the LAD due from the respondent. It is only the Payment Certificate - Final which states "delay: 172 days". But in the contents of that document which set out the various calculations on the items of works,

A including variation, and deductions for retention, previous payments made, and GST, no reference at all is made to any LAD deductions. Not even a hint. There is not even a standard statement to say the amount is subject to LAD, if any.

B **[37]** The respondent's argument that it did not have time even to address the LAD issue before the petitioner filed the petition is also unconvincing, for the petition was only presented in November 2017, whereas the Payment Certificate - Final as issued by the respondent was dated in August 2017.

C **[38]** It therefore follows that the argument that the petitioner is not a creditor since the debt was disputed (see *Pembinaan Purcon Sdn Bhd v. Entertainment Village (M) Sdn Bhd* [2004] 1 LNS 682; [2004] 1 MLJ 545) cannot be sustained.

Set Off, If Alleged, Must Be Proven

D **[39]** Furthermore the respondent's contention on its right to claim LAD must also be considered in the context of the interpretation of s. 75 of the Contracts Act 1950 by established authorities. Section 75 reads as follows:

> 75. Compensation for breach of contract where penalty stipulated for
>
> When a contract has been broken, if a sum is named in the contract as
E the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

F **[40]** It is now settled law that under s. 75, there is no distinction between penalties and liquidated damages, and that the Federal Court in *Selva Kumar Murugiah v. Thiagarajah Retnasamy* [1995] 2 CLJ 374; [1995] 1 MLJ 817 had ruled that in those cases where damage for actual loss is not too remote and could be assessed by settled rules (as against those cases where there are no
G known measure of damages employable, making reasonable compensation difficult to assess), the plaintiff must prove the actual loss suffered.

[41] Thus notwithstanding the language of s. 75, the failure to tender evidence to prove damages for actual loss in such cases will consequent upon the refusal by the court to award damages.

H

[42] The decision in *Selva Kumar* was reaffirmed by the Federal Court in *Johor Coastal Development Sdn Bhd v. Constrajaya Sdn Bhd* [2009] 4 CLJ 569. In that case, the respondent had defaulted in making payments for the remainder of the purchase price under certain sale and purchase agreements,
I which resulted in the appellant vendor, in accordance with the terms of the agreements, forfeiting the moneys already earlier paid by the respondent. The respondent's claim for the repayment failed. Arifin Zakaria CJ (Malaya) (later, Chief Justice) for the majority, held thus:

[32] Reverting to the first question posed to us, based on the authorities considered above, it is my view that the legal position may be summarised as follows:

> The appellant/vendor cannot recover or retain without proof by evidence of the loss or damage suffered as a result of the breach of the agreements. This is because s. 75 of the Act provides that in every case, the court must determine what is reasonable compensation, 'whether or not actual damage or loss is proved to have been caused thereby.'

[33] And as was held in *Selva Kumar* actual damages or reasonable compensation must be proved in accordance with the principles set out in *Hadley v. Baxendale* [1854] 9 Exch. 341; [1843-1860] 9 Exch. 341.

[34] The appellant urged this court to depart from *Selva Kumar* and the long series of decisions on s. 75 relying on a recent two bench decision of the Supreme Court of India in *Oil & Natural Gas Corp Ltd v. Saw Pipes Ltd* [2003] LR 1 348.

[35] Upon close examination, I find that *Oil & Natural Gas* falls in the category of cases where the loss suffered is incapable of assessment. Hence, the amount stipulated may be regarded as a genuine pre-estimate of damages and therefore it is recoverable. Further in *Selva Kumar* itself the court recognised that where the court finds it difficult to assess damages as there is no known measure of damages employable, the stipulated sum may be recoverable. It should also be noted that nowhere in *Oil & Natural Gas*, the Indian Supreme Court stated that the provisions of the Indian Contracts Act can be contracted out.

[36] In view of the above, I am of the view that *Selva Kumar* is still good law.

[43] And it is not doubted that LAD claims would fall within the category of cases where damages could be assessed by settled rules. In other words if the claim is for LAD in relation to construction contracts like the respondent in the case presently before me is asserting, actual loss must be proven (see also a recent decision of the High Court in *Kejuruteraan Bintai Kindenko Sdn Bhd v. Serdang Baru Properties Sdn Bhd & Another Case (No. 2)* [2018] 1 CLJ 369).

[44] As such, the respondent in the instant case cannot similarly simply rely on the amount stipulated as LAD as damages but instead has still to prove its damages.

Cross Claim In This Case (If Any) Does Not Render The Debt Bona Fide Disputed

[45] The question then is whether the argument of the cross-claim by the respondent is sufficiently meritorious to render the alleged debt to be *bona fide* disputed on substantial grounds. In the Court of Appeal decision in *Dataran Rentas Sdn Bhd v. BMC Constructions Sdn Bhd* [2007] 6 CLJ 613; [2008] 2 MLJ 856 Gopal Sri Ram JCA (as he then was) held the following:

A [4] The second issue is the appellant's alleged right to a set off. As a general rule, every contracting party has, in equity, a right to set off any sum - liquidated or unliquidated - that may be due from the other provided it arises out of the same or substantially the same transaction (see *Permodalan Plantations Sdn Bhd v. Rachuta Sdn Bhd* [1985] CLJ Rep 242; [1985] 1 MLJ 157; *Shanghai Hall Ltd v. Town House Hotel Ltd* [1967] 1 LNS
B 158; [1967] 1 MLJ 223. But, like any other common law or equitable right it is capable of exclusion or modification by contract. And where this has happened, the former ceases to be exercisable (see *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd* [1995] 2 CLJ 345; [1995] 2 MLJ 57). Thus, the question whether a building contract admits
C a right of set off is one that turns upon the true construction of the particular contract. In the present case, as pointed out by my learned brother, the common law and equitable rights of set off have been modified by the terms of the contract. The contractual conditions precedent to the exercise of the right to a set off were clearly absent here and as such the appellant could not on the facts assert the right.

D **[46]** The position was further clarified by the Court of Appeal in the judgment of Zulkefli Ahmad Makinuddin JCA (now PCA) in that same case in the following manner:

[9] We are of the view that based on cl. 26(1)(a) of the PAM Conditions, it gives the respondent the contractual right to determine the respondent's
E employment under the contract in the event of the failure of the appellant to pay within the time stipulated under cl. 30(1). On this point it is to be noted that in the case of *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd* [1995] 2 CLJ 345; [1995] 2 MLJ 57, the Federal Court held, *inter alia*, that by virtue of the express provisions of the contract allowing contractual right of set off, it was construed that the
F contract excludes the operation of common law rights of set off. **As such, the employer's right of set off against the sum due under the contract is restricted to those expressly allowed under the contract**.

In the present case the appellant has no permissible set off under the PAM contract against the certified sum. There was no architect's
G instruction given under cl. 2(1) that the works carried out by the respondent was defective. Neither was there any instruction of the architect given under cl. 6(4) for the removal from site of any work, materials or goods which are not in accordance with the contract at all material time prior to the determination of the contract on 24 April 1998.

H [10] Applying the legal principles laid down by the Federal Court in *Pembenaan Leow Tuck Chui*'s case, it is our judgment that the appellant have no right to deduct or set off against the sums certified under the interim certificates. The respondent is entitled to payment immediately and as such the debt cannot be disputed and the appellant has no meritorious defence ...

I (emphasis added)

[47] In the instant case, the right to set-off is not stated. In fact, as the respondent highlighted the relevant cl. 12.1 of the letter of award referred to earlier, the respondent had the right to back charge the petitioner for any such expenses or record the same as a debt due from the petitioner. The respondent did not produce or submit to the court on any other clauses of relevance.

[48] In my view, the right of set-off in equity can be said to have been modified by this cl. 12.1 which therefore means that the respondent could only have the option of either back charging the LAD or recognising the LAD as a debt due. But not effect a set-off instead, since that is not contractually provided for.

[49] I have also considered this point in the case of *Bakti Dinamik Sdn Bhd v. Bauer (Malaysia) Sdn Bhd* [2016] 10 CLJ 247 where I referred to the case of *Hasjuara (M) Sdn Bhd v. Bio Science Capital Sdn Bhd* [2009] 1 LNS 1430; [2009] MLJU 1252 and said:

> [51] In *Hasjuara (M) Sdn Bhd v. Bio Science Capital Sdn Bhd* [2009] 1 LNS 1430; [2009] MLJU 1252, the High Court considered *Dataran Rentas* and concluded that in the latter case the common law and equitable rights of set-off had been modified by the terms of the contract whereby the contractual conditions precedent to the exercise of the right to a set-off were clearly absent, such that the appellant could not, on the facts, assert such a right of set-off. The High Court added thus:
>
> > In short an employer such as the Respondent may only deduct or set off if there are express provisions in the contract for a deduction or set-off and even then limited only to the scope of the permitted deductions or set-offs.
> >
> > In the instant case Clause 22.1 which provides for Liquidated and Ascertained Damages provides that if the contractor fails to complete the works by the date for completion or within any extended time and the employer deems that the same ought reasonably to have been completed then the contractor, i.e., the Petitioner is liable to pay to the Employer LAD for the period from the Date for Completion or any extended date where applicable to the date of Practical Completion. The clause specifically provides that: "... The Employer may deduct such sum as a debt from any monies due or to become due to the Contractor under this Agreement." It appears therefore on a perusal of the Agreement as a whole that the parties agreed to allow the Respondent to set-off LAD for the period specified, from monies due to the Petitioner as Contractor ...
> >
> > From a cursory reading of the Agreement between the parties it appears that the Respondent is entitled to set-off any LAD claims it might have against the Petitioner.

[50] I should emphasise however, that the respondent is only submitting that the debt is disputed since the petitioner had delayed for 172 days, which, according to the respondent would entitle the respondent to claim LAD against the petitioner. The respondent never expressly or specifically asserted it has a cross-claim or is entitled to set-off the LAD amount from the payment due to the petitioner.

[51] In *Zalam Corporation Sdn Bhd v. Dolomite Readymixed Concrete Sdn Bhd* [2011] 9 CLJ 705, *albeit* concerning a *Fortuna* injunction application, the argument of the existence of a cross-claim was rejected. The Court of Appeal, in the judgment of Sulaiman Daud JCA said:

> (1) **The statutory notice which was presented to the plaintiff was based on a final judgment and the application for stay of execution was dismissed**. Moreover, there existed a judgment debt which was supposed to be paid by the plaintiff to the first defendant. **The existence of any counter claim which was in dispute and yet to be decided could not be accepted as an excuse for the plaintiff's refusal to comply with the said statutory claim**.
>
> (2) The case of *Pontian United Theatre Sdn Bhd v. Southern Finance Berhad* which was referred by the plaintiff's counsel had not directed a legal proposition that the existence of a counter claim or cross claim could be made as an excuse to restrain a particular creditor from presenting a winding up petition. In that case, the winding up petition had already been filed and one of the issue before the court was whether the existence of a counter claim for the sum exceeding the amount claimed through a winding up petition could be used as a basis to dismiss the said petition. It had no connection with an application to restrain the presentation of a petition.

[52] As such, in the instant case, the argument that the petitioner had delayed for 172 days, without more, does not remotely come close to being an argument on the existence of a cross-claim on substantial grounds. The debt cannot thus be said to be *bona fide* disputed.

The Undisputed Portion Of Debt Is Above Statutory Threshold

[53] In any event, the one other main reason why this resistance by the respondent is futile is this. Even assuming the respondent had a valid counter claim or set-off to rebut the presumption of solvency (which it did not have), the purported amount of the LAD as made clear by the respondent itself is only RM430,000. This amount is less than the debt claimed by the petitioner of RM519,677.01. The difference sum, being, for argument sake, the "undisputed" portion of the debt is almost RM90,000. And this is far exceeding the minimum statutory winding up threshold of RM10,000.

[54] The Federal Court in the case of *Malaysia Air Charter Company Sdn Bhd v. Petronas Dagangan Sdn Bhd* [2000] 4 CLJ 437 has ruled that a notice of demand under s. 218(2)(a) of the Companies Act 1965 need not specify the exact sum due as at the date of the demand since for so long as the sum due

exceeds RM500 (the statutory threshold then) and remains unpaid, after a demand has been made, without a reasonable explanation to the satisfaction of the court, there is "neglect" to pay such sum within the meaning of the said section. The Federal Court was of the view that commercial reality demanded that preference be accorded to an interpretation that will remove from unmeritorious respondents the temptation to undertake an investigation into the exactness of the debt claimed to be owing on the relevant date.

[55] This follows the English case of *Re Tweeds Garages Ltd* [1962] 1 All ER 121 which held that where there was no doubt that petitioners were creditors for a sum which would otherwise entitle them to a winding-up order, a dispute as to the precise amount owed was not a sufficient answer to the petitioner such that a winding-up order would be granted.

[56] There is no reason not to apply the above-said ruling to the corresponding provisions in the Companies Act 2016, specifically s. 466(1) which is substantially similar to the former s. 218(2)(a) of the Companies Act 1965. Thus in the instant case, taking into account the "disputed" portion, the remainder sum making up the debt in the statutory demand issued by the petitioner is still comfortably above the minimum threshold under the law, beyond which a winding up may be pursued.

No Evidence Of Commercial Solvency

[57] The solvency or otherwise of the respondent is in this context of little relevance. Once the debt is shown not to be *bona fide* disputed on substantial grounds, and the presumption of insolvency unrebutted, even if the respondent could show that it was actually solvent, its refusal to pay up would still entitle the petitioner to pursue the winding up of the respondent.

[58] It is settled law that the issue on the inability to pay debt is to be considered in commercial context, which is the neglect to pay current demands regardless of whether the debtor is in possession of assets which, if realised would permit it to discharge its liabilities. The test of commercial insolvency simply means that the respondent company is not able to meet current debts when they fall due (see *System Communication Engineering Sdn Bhd v. Zabidin Sdn Bhd* [1999] 1 LNS 79; [1999] 1 AMR 1187).

[59] This is why it has been said that a company could be both insolvent but wealthy at the same time (see, for example, the Privy Council decision in *Malayan Plant (Pte) Ltd v. Moscow Narodny Bank Ltd* [1980] 1 LNS 44; [1980] 2 MLJ 53 and the Supreme Court decision in *Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd* [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303. It is wholly insufficient that the assets might be realisable at some future date after the debts have become due and payable (see the Supreme Court decision in *Lian Keow Sdn Bhd (in Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd* [1988] 1 LNS 44; [1988] 2 MLJ 449).

[60] In essence, the test of commercial solvency requires immediate availability of assets to pay current liabilities whenever they fall due. And I emphasise that it is cash flow solvency that really matters, not balance sheet solvency.

[61] In the instant case, the respondent has not satisfactorily shown that it is not insolvent based on its cash flow position. In any event, it has also not furnished any evidence of its more recent financial position, not even any unaudited management accounts. This does little to assist the case of the respondent.

Even If 'Solvent', Cannot Refuse To Pay Up

[62] For completeness, I must add that even if the respondent could show that it was not insolvent (which it fails to here), there is no justification whatsoever for its refusal to pay the debt claimed by the petitioner.

[63] In this connection, in *WWTAI Finance Ltd v. IES Energy Holdings Sdn Bhd* [2016] 1 LNS 1801; [2016] MLJU 1591, I ruled as follows:

> [90] But even if it were able to exhibit its solvency, it is not open to the Respondent to assert that it is able to pay the debt but chooses not to at the same time. In *Cornhill Insurance Plc v. Improvement Services Ltd and Others* [1986] 1 WLR 114, Harman J held that where a creditor's debt is clearly established, the creditor has the right to present a winding up petition and obtain relief even though the company was solvent. The solvency of a company would count for nothing if it persists in non-payment or that it is nevertheless not ready, willing and able to meet the demand of the creditor.
>
> [91] Conversely, the discretion to refuse winding up could be exercised if the respondent debtor is ready, willing and able to meet the demand of the creditor. In the English Court of Appeal decision in *Re: The Imperial Hydropathic Hotel Company, Blackpool, Ltd* [1882] 23 Ch D 1 where the company was solvent and the creditor accepted the proposal to pay the debt within one month, the Court of Appeal ordered the debt to be paid within one month, in default of which "there will be the usual winding-up order" (see also the Court of Appeal decision in *Lafarge Concrete (M) Sdn Bhd v. Gold Trend Builders Sdn Bhd* [2011] 1 LNS 1763; [2012] 6 MLJ 817).
>
> [92] In my view, the concept of commercial solvency in insolvency laws, and the presumption it creates under Section 218(2) of the CA should not be treated as existing or operating in vacuum. It does not and should not concern itself purely with the state of the debtor's financial and cash-flow position. It should rightfully encompass the equally critical issue of the actual fulfilment of the obligation to pay the debt to the creditor.
>
> [93] Thus, even if a debtor company could demonstrate ready availability of more than sufficient cash-flow and liquid assets as well as funds capable of paying its debts whenever they fall due, its refusal or unwillingness to actually make the payment available to the creditor, for

any reason other than that the debt is *bona fide* disputed on substantial grounds or other valid bases, must still mean that the company fails to rebut the presumption of its insolvency.

[94] This would tantamount to the company not being commercially solvent and thus being unable to pay its debts for purposes of Section 218(1)(e) and 218(2) of the CA. After all, such refusal or neglect to pay necessarily means the absence of payment "to the reasonable satisfaction of the creditor" within the meaning of Section 218(2)(a)".

[64] A neglect to payment in the first place triggers the statutory presumption under s. 466(1)(a). The question then turns on whether the respondent debtor can show it is not insolvent in order to rebut the presumption. But even if the presumption is rebutted, a continued refusal cannot deny the right of a creditor to file a winding-up petition against a debtor.

[65] Thus, if a company is solvent and indebted to a creditor, a simple refusal to pay ordinarily cannot legitimately restrain the granting of a winding-up order. It is otherwise unsupportable in principle, constitutes an unwarranted departure from public policy, conflicts with common and business sense logic and certainly not tenable under the law.

[66] The respondent complained that the petitioner's action of advertising in newspapers, had caused irreparable damage and reputation to the respondent who is in the construction business and unnecessary strain on its major shareholders which are under Gates PCM Constructions Ltd, Singapore.

[67] But this is a natural consequence of the presentation of a winding-up petition. Any fears of damage should be avoided by settling the judgment debt (see the Court of Appeal decision in *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380).

Respondent Did Not Raise LAD Earlier And Should Be Estopped

[68] It is not disputed that the respondent had produced documents which showed that Puncak Seputih had imposed LAD on the respondent. But equally unchallenged is the fact that Puncak Seputih as the main contractor has no contractual relationship with the petitioner.

[69] The fact that the respondent at the time of the presentation of the winding-up petition on 9 November 2017 had not received payment from the main contractor who was said to be withholding payment in order to deduct the LAD upon settling with the project owners is a consideration irrelevant to the petitioner whose contractual relationship is with the respondent.

[70] The petitioner claimed that whilst 23 April 2017 was the date of completion of the entire works of the project, the petitioner had completed its scope of works earlier on 20 February 2017. This is stated in the petitioner's letter to the respondent dated 7 April 2017. There is however some degree of dispute on whether this is accurate given the conflict in the

averments by the parties on this point. I accept for present purposes that the Payment Certificate - Final which was also signed by the petitioner did specify a delay of 172 days.

[71] But whether or not the respondent genuinely intended to claim for the LAD in the first place is of some doubt. Affidavit evidence suggests that the totality of the debt RM570,991.59 now demanded by the petitioner in the petition had during the material period always been recognised by the respondent, and the issue of making a claim for the LAD (despite the bare statement of delay in Payment Certificate - Final) had never been raised by the respondent then.

[72] I accept that there is evidence in the form of an email dated 11 February 2017 where the respondent reminded the petitioner that if the petitioner failed to start and complete on the dates specified, the respondent would seek to enforce its rights under the contract. But that was expressed in general terms, at an earlier point in time, and in the context when the respondent was reminding the petitioner to not delay in commencing works.

[73] Instead, there is much validity in the assertion that the respondent should be estopped from raising the LAD issue or any suggestion of cross claim because in its letter of 10 February 2017 to the petitioner, it is plainly stated that the outstanding payment from the respondent to the petitioner as at 9 February 2017 is RM519,677.01.

[74] The respondent had also admitted and was ready to pay the petitioner RM450,000 as at 11 February 2017, as shown in the email dated 11 February 2017 through Puncak Seputih. There was absolutely no mention of any payment due from the petitioner to account for any delay, other than the general reference to the respondent reserving its rights in the event of a delay in the completion of the project, as I have just mentioned.

[75] In addition, and more crucially, the petitioner claimed that at a meeting involving both the respondent and the petitioner on the more pertinent and later date of 23 August 2017 (also the date of the payment Certificate - Final) the respondent confirmed that it would make Payment of RM570,991.59 to the petitioner within two weeks to one month from the date of that meeting. The fact and conclusions of this meeting were recorded in a letter of the same date issued by the petitioner to the respondent. This letter never got any response from the respondent, which later resulted in the service of the statutory demand for the said debt being claimed. The respondent should therefore be estopped from taking a contrary position now (see the leading Federal Court decision in *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283).

[76] The above admissions on the part of the respondent are no doubt denied by the respondent, but the averments by the respondent challenging the same were not accompanied by contemporaneous documents to credibly discredit the contentions of the petitioner.

[77] The value of contemporaneous documents in the form of such letters from the petitioner cannot be emphasised enough. In the case of *Hijau Bumi Petroleum Sdn Bhd v. Platinum Green Chemicals Sdn Bhd & Ors* [2017] 1 LNS 1253; [2017] 8 AMR 684, I stated thus:

> [44] I am, in this context reminded of the observation by Chang Ming Tat FJ on the importance and value of contemporaneous acts and documents, and the need to test oral testimonies against them, who in the case of *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 2 MLJ 229, expressed as follows:
>
> > Nevertheless the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. *For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings*. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity ... (emphasis added)

[78] It could not be shown by the respondent, for instance, that it had provided any response to the letter of the petitioner dated 23 August 2017 to deny their contents. An evaluation of the documents contemporaneous with the event, particularly that letter from the petitioner as well as the earlier letters from the respondent, when tested against the totality of the affidavit evidence, would in my view lead to lend greater credibility to the case of the petitioner.

[79] On a close examination of the totality of the affidavit evidence before the court, I therefore find that the averments of the petitioner on the admission of debt by the respondent are not adequately or credibly disputed by the respondent. There is thus no *bona fide* dispute on the debt.

Conclusion

[80] Accordingly, in view of the foregoing reasons, I find that there is plainly no *bona fide* dispute on the debt as demanded by the petitioner in its winding-up petition, and that the respondent has also manifestly failed to rebut the presumption of insolvency. I therefore allow the winding-up petition and grant a winding-up order against the respondent.